IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 330 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NARENDRA GULABCHAND SHAH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 330 of 2002

MR NN PRAJAPATI for Petitioner No. 1

THROUGH JAIL for Petitioner No. 1

MR PR ABICHANDANI, APP, for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 19/10/2002

ORAL JUDGEMENT

1. This Criminal Appeal arises out of judgment and order rendered by learned Special Judge, Kutch, at Bhuj, on the 15th February, 2002, in Special Case No.36 of

2000, convicting the appellant for offence punishable under Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act" for short) and sentencing him to undergo rigorous imprisonment for three years and to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for one year. The accused has been given benefit of set off by the Trial Court.

2. As per the prosecution case, P.S.I., Mandvi, Moharjitsinh Jilubha Chudasma, was on patrol duty during night hours on the 9th February, 2000. While he was on patrolling after midnight, i.e. in the early morning hours of the 10th February, 2000, along with Police Constable-Vanrajsinh, he came across a person coming from Azad Chowk side and proceeding towards Bhid Chowk. The said person had an unstable gait. He was, therefore, intercepted and inquired. He was not able to speak properly and was found that he was probably drunk. P.S.I.-Chudasma, therefore, summoned two Panch witnesses and searched the person of that man, who, ultimately, turned out to be present appellant. In search, an amount of Rs.247/- was found, which was in the form of some currency notes and some coins. Some photographs and passes were also found and a white polyethylene bag with a black polyethylene bag inside was also found from the inner pocket of his jacket. The contents thereof, on being smelt, was found to be ganja. He was, therefore, asked, whether he would like to be searched in presence of a Magistrate, but he denied. The ganja which was found from the accused was weighed and it was found to be 140 grams. It was divided into two parts and packed into two different packets of 70 grams each. The packets were properly sealed and slips containing signatures of the Panch witnesses were affixed over it. The seizure memo was prepared, the accused was arrested and higher officer was informed about the incident. An entry was made in the Station Diary regarding this. A First Information Report was lodged with the P.S.O. by P.S.I.-Chudasma and the muddamal was sent to Forensic Science Laboratory for analysis and the analysis report was that the contents were ganja. Since the accused was found in a drunken condition, he was prosecuted under the Bombay Prohibition Act also and came to be convicted thereunder as well.

3. Having found sufficient material against the accused, the police filed charge sheet and that is how Special Case No.36 of 2000 came to be registered before the Sessions Court, Kutch, at Bhuj.

4. Charge was framed against the accused at Ex.1.

The accused pleaded not guilty to the charge and claimed to be tried. The prosecution adduced evidence and considering the evidence led by the prosecution, the learned Special Judge came to a conclusion that the prosecution successfully proved the charges against the accused, and recorded conviction and awarded the sentence as stated above.

5. Learned Advocate, Mr. Prajapati, submitted that the charge as well as the conviction under Section 20(b)(i) is defective for the reason that it deals with contravention in the form of cultivation of cannabis plant as contemplated under clause (a) of Section 20 whereas, in the instant case, even if the case of the prosecution is accepted at face value, it was only a case of possession of ganja and, therefore, neither the appellant could have been charged nor could he have been convicted under Section 20(b)(i) of the NDPS Act. Mr. Prajapati submitted that the prosecution evidence is scanty and suffers from contradictions and improvements and, therefore, the appeal may be allowed.

5.1 By way of alternative submission, he submitted that, if the Court is not inclined to accept the appeal as a whole, the sentence awarded to the appellant is too harsh. He submitted that the appellant has suffered at the hands of nature in the earthquake. He also submitted that, legally, even if the defect in charge is not considered as sufficient to set aside the conviction, the sentence that could have been awarded by the Trial Court could not have exceeded six months rigorous imprisonment as the case against the appellant would fall under Section 20(b)(ii) of the NDPS Act. He, therefore, urged that the appeal may be allowed.

6. Learned Additional Public Prosecutor, Mr. Abichandani, has opposed this appeal. He, in all fairness conceded that the appellant could not have been charged and convicted under Section 20(b)(ii) of the NDPS Act. However, he submitted that this defect is not sufficient to set aside the conviction. According to him, in substance, the appellant was aware about the case against him and for what he is being tried. He has cross-examined witnesses on relevant aspects. He was defended by a legal expert and, therefore, in light of Section 2(1)(v) of the Code of Criminal Procedure, this defect may not be considered sufficient to set aside the conviction.

6.1 As regards merits, Mr. Abichandani submitted that the Panch witnesses as well as the raiding officer,

P.S.I.-Chudasma have deposed about the search and seizure. The requisite procedure has been complied with. Although the search was not on prior information, after knowing that the appellant possessed ganja, requirements of Section 50 have been complied with. Mr. Abichandani, therefore, submitted that the conviction may be confirmed. So far as sentence part is concerned, he could not oppose this appeal.

7. Having regard to the facts of the case, the charge is at Ex.1, which is for an offence punishable under Section 20(b)(i) of the NDPS Act. Section 20 of the NDPS Act runs as under :-

"20. Punishment for contravention in relation to cannabis plant and cannabis:- Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder:-

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable,-

(i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine which may extend to one lakh rupees; and"

8. A plain reading of Section 20 would indicate that in a case like present one, where the case of the prosecution is that the accused was found in possession of ganja, the case would be governed by section 20(b)(ii) of the said Act. The question that would arise, thereafter, would be whether the case would be governed under clause (A), (B) or (C) of Section 20(b)(ii) of the NDPS Act. In this regard, in the instant case, the accused appellant was found to be possessing 180 grams of ganja. If the table prescribing small quantity and commercial quantity is seen, item No.55 deals with ganja, which says that quantity upto 1000 grams is a small quantity and, therefore, the present case would be governed under Section 20(b)(ii)(A) of the NDPS Act which prescribes a rigorous imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000-/- or with both.

7. This Court has gone through the record and proceedings. The raiding officer-Moharajsinh Jilubha Chudasma is examined at Ex.9. He states that, he was on a night patrolling duty in Mandvi town along with Police Constable-Vanrajsinh. He came across Police Head Constable-Naranbhai Muljibhai and, while they were talking, a person came from Azad Chow and was going towards Bhid Chowk. As his gait was unstable, he was intercepted and inquired of. He was found to be drunk and he was not able to speak. Therefore, two Panch witnesses were called and search conducted. From the inner pocket of his jacket, the contraband was found, which was weighed and found to be of 140 grams. It was divided into two packets of 70 grams each and sealed in presence of Panch witnesses; sent for analysis to the Forensic Science Laboratory; and the F.S.L. opined that it was contraband-ganja. The say of this witness is tested on touch stone of cross-examination, but nothing turns on that.

8. P.W. 2, P.S.I-Chudasma is supported by Panch witness-Gajendra Vishwanath Joshi (Ex.6). He fully supports the prosecution case. He has also been cross-examined and nothing turns on that.

9. The third witness, who is examined, is Police Constable-Nanjibhai Veljibhai (Ex.19). He is the person who took the sample to F.S.L. He says that he delivered the same in sealed condition.

10. It is, therefore, clear that the accused was found in possession of 140 grams of ganja. The police was not acting on prior intimation or information and, therefore, procedural requirement of NDPS Act were not required to be followed. However, after finding that the accused possessed ganja, they have followed the requirements of Section 50. They have even intimated the superior officer about the arrest immediately and entry is also made immediately in the Station Diary. Therefore, there was no procedural lacking which would have come to the rescue of the appellant. The conviction, therefore, has rightly been recorded by the learned Special Judge, probably under a wrong provision. This has happened probably because the learned Judge proceeded under the unamended NDPS Act of 1985, which actually came to be amended by Act 9 of 2001, with effect from the 2nd October, 2001. The provisions which are referred to by the learned Judge in paragraph 39 of his judgment relate to the old Act, but the new Act having come into force from the 2nd October, 2001, the same would be applicable to the facts of the present case and,

therefore, as stated above, the conviction will have to be recorded under Section 20(b)(ii)(A) of the DPS Act.

11. It has also to be noted that the charge was under Section 20(b)(i) of the NDPS Act, which was framed on the 24th October, 2001. Therefore, that also could not have been under the old Act. Still, however, considering the provisions contained under Section 215 of the Code of Criminal Procedure, it cannot be said that it has occasioned in failure of justice because the charge categorically states what the allegation against the accused was, namely, that he was found in possession of 140 grams of ganja, and in absence of pass or permit, in contravention of Section 8(c) of the NDPS Act, which has not been amended by the Act 9 of 2002 and, therefore, this defect in charge cannot help the appellant.

12. This Court is, therefore, of the view that the conviction is rightly recorded by the Trial Court and deserves to be confirmed. The interference, at the most, can be in the quantum of punishment. In view of the provisions contained in Section 20(b)(ii)(A), the punishment for small quantity can be rigorous imprisonment for a term which may extend to six months. In the facts of the case, ends of justice require that maximum punishment is inflicted. There is no need for interference so far as the order of the Trial Court regarding imposition of fine is concerned except the default clause. The appeal, therefore, stands allowed to that extent. The judgment and order recording conviction of the appellant for possessing ganja is confirmed under Section 20(b)(ii)(A) of the Act, as amended by Act 9 of 2001. He is sentenced to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs.10,000/- and, in default, to undergo rigorous imprisonment for three months. The benefit of set off be made available to the accused for the sentence already undergone even for default in payment of fine, considering the special facts of the case.

[A.L. DAVE, J.]

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